

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JAMES SMELKO

Criminal No. 22-146

RESPONSE TO DEFENDANT’S MOTION TO COMPEL

Currently pending before the Court is the Defendant’s Motion to Compel (ECF No. 96). However, there is nothing to compel that has not already been provided or that is not, consistent with the law governing discovery in child pornography cases, available for review at a government facility. As set forth herein, this Defendant’s motion should be denied.

The Defendant was charged on June 7, 2022, by a federal grand jury with one count of possessing material containing an image of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and 2252A(b)(2). ECF No. 3. Defendant James Smelko was originally granted pre-trial release on June 22, 2022. On October 19, 2022, a Petition for Action on Conditions of Pretrial Release was filed related concerning behavior identified by the monitoring software on the Defendant’s phone (hereinafter “pretrial phone”). The pretrial phone was then seized and subsequently searched pursuant to a search warrant. The forensic examination of the pretrial phone revealed that the Defendant was again in possession of images of child pornography. Federal Bureau of Investigations (“FBI”) Special Agent Lauren Scott prepared a report summarizing the findings on that phone.

On November 10, 2022, the Court then held a hearing on the pretrial release petition. A transcript of that proceeding is available at ECF No. 87. As noted at that hearing, the FBI report

related to the Defendant's phone was provided to defense counsel prior to the hearing. ECF No. 87, at 4:20-23. The report was also admitted as an exhibit. *Id.*

On August 1, 2023, a Superseding Indictment was returned by a grand jury, which added a second count of possessing material containing an image of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and 2252A(b)(2). This count related to the Defendant's pretrial release phone. The Defendant now claims that "the government has not produced any discovery" related to this count. ECF No. 96, at 1.

This is belied by the record. As shown above, the government produced the FBI report summarizing the findings on the Defendant's phone over a year ago. To date, that is the only report related to the Defendant's phone. The government anticipates that there will be one additional report that corrects the identities of certain minors listed in the original report.¹ That report is not yet final. It will be provided promptly when finalized.

As the government has notified defense counsel additional evidence in this case is and will remain available for defense counsel to review. Pursuant to 18 U.S.C. § 3509(m)(1) "any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court." As it relates to the discovery process, the government is obligated to "provide[] ample opportunity for inspection, viewing, and examination" of the property or material containing child pornography "at a Government facility." 18 U.S.C. § 3509(m)(2). That standard has been met here. Specifically, the reviews copies of the forensic examination of the Defendant's devices,

¹ The government also anticipates producing additional discovery related to Count One. Additionally, the government will produce Jencks discovery at the required time.

including a review copy of the pretrial phone, are available at the FBI.² The government remains willing to facilitate a review of those devices on request.

For all the foregoing reasons, the Defendant's motion should be denied.

Respectfully submitted,

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² Out of an abundance of caution, the government has prepared and sent to defense counsel contemporaneous with this filing a list of items that have been forensically examined and have copies available for review at the FBI.